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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ELONA GUTTMAN, Plaintiff and Appellant, v. ISAAC REGEV et al., Defendants and Respondents.	B238705 (Los Angeles County Super. Ct. No. LC087229)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank J. Johnson, Judge. Affirmed.

Michael P. Rubin & Associates and Michael P. Rubin for Plaintiff and Appellant.

Speciale & Burton and Steven E. Burton for Defendants and Respondents.

Elona Guttman (Guttman) appeals the terminating sanction entered against her for failing to appear at a deposition in the action she filed against the respondents, Isaac Regev (Isaac) and Drora Regev (collectively the Regevs).

We find no error and affirm.

FACTS

The December 23, 2009, complaint

Guttman sued the Regevs for fraudulent conveyance, constructive trust and declaratory relief based on the following allegations.

In March 2007, Guttman obtained a dissolution of her marriage to Ron Regev (Ron). She was awarded a property on Frankfort Street (Frankfort property). He was ordered to pay off and remove all liens from that property. In exchange, he received properties on Keswick Street and Lenark Street (the Keswick and Lenark properties). Ten days later, he conveyed the Keswick and Lenark properties to a trust (trust). The Regevs were the trustees. Isaac is Ron's brother.

Ron failed to remove all the liens from the Frankfort property. In April 2008, the trial court entered a judgment for Guttman against Ron in the amount of $265,635.91 with 10 percent interest from March 1, 2008.

The transfers of the Keswick and Lenark properties to the trust violated the Uniform Fraudulent Transfer Act because they were made to hinder, delay or defraud Guttman, a creditor. Alternatively, the transfers were made by Ron without receiving reasonably equivalent value in exchange, and he was engaged in, or about to engage in, business or transactions for which his remaining assets were insufficient, or he intended to incur debts beyond his ability to pay. The Regevs knew Guttman's claims could be satisfied only out of the Keswick and Lenark properties. Nonetheless, the Regevs accepted the transfers with the intent to defraud Guttman. Among other remedies, the transfers should be set aside.

The original trial date; the first continued trial date

Trial was originally scheduled for April 27, 2011. In an ex parte application to continue the trial, Guttman stated that she "cannot realistically travel to Los Angeles until

June 24, 2011." The attached declaration of counsel indicated that Guttman lost her California residence in foreclosure. She relocated to Tel Aviv, Israel where she works as a dental hygienist and is the sole caretaker of her two minor daughters. If she traveled to Los Angeles for the trial, she would jeopardize her job and have to take her children out of school.

Based on Guttman's application, the trial was continued to July 18, 2011. The mandatory settlement conference was set for July 6, 2011, and the final status conference was set for July 11, 2011.

The June 14, 2011, order

Guttman sought to compel Isaac's deposition, and the Regevs sought to compel Guttman's deposition. In Guttman's papers, she indicated that she would be traveling to Los Angeles to appear in court on July 11, 2011.

On June 14, 2011, the trial court ordered the counsel for both sides to meet and confer with each other and select deposition dates prior to the July 6, 2011, mandatory settlement conference. In addition, the trial court ordered that Guttman's deposition take place before Isaac's.

The second continuance of the trial

On June 22, 2011, Guttman again filed an ex parte application to continue the trial. In her application, she stated that her father passed away on June 16, 2011. Based on her Orthodox religious beliefs, she could not travel during a 30-day mourning period. She had no personal knowledge of any relevant facts, and there was no reason for her to be deposed. As a result, the Regevs would not be prejudiced if her deposition was not taken. Guttman's attorney declared, "I do not need evidence from [Guttman] to establish the prima facie case against [the Regevs]. . . . [The Regevs'] defense rests on their own evidence that the transfers were made for consideration." He also averred that Guttman has a minimal paying job, supports two minor children, and relies on her family for financial assistance. As a result, "[h]andling the expense for travel, even for the trial in this case, . . . is very difficult."

The trial was continued to October 11, 2011.

The e-mail from Guttman's counsel; the agreement on deposition dates

In an August 3, 2011, e-mail, Guttman's counsel advised the Regevs' counsel that Guttman would be traveling to Los Angeles at the end of the following month and would be available for her deposition then. Counsel for the parties agreed that Guttman would be deposed on September 30, 2011, and that if she appeared, Isaac would then be deposed on October 3, 2011.[1]

Guttman's ex parte application to continue the trial a third time

On September 22, 2011, Guttman filed an ex parte application to continue the trial to a date in December 2011. She claimed that she was unable to travel from Israel to the United States in October 2011.

In his supporting declaration, counsel for Guttman declared that she "moved to Israel because her ex-husband did not pay child support (as ordered), and wrongfully divested himself of assets from which he was required to pay [Guttman] her share of the community property." He explained that she speaks primarily Hebrew, and he does not speak Hebrew. They have difficulty communicating. When the final settlement conference/mandatory settlement conference was continued to October 4, 2011, and the trial was continued to October 11, 2011, he thought the dates would be satisfactory because they did not fall on the Jewish holidays. On August 22, 2011, Guttman informed him that "she might have difficulty traveling to the United States to attend the [mandatory settlement conference] and trial date due to the Jewish holidays." About a week later, she informed her counsel that she would be unable to be in Los Angeles on the scheduled dates. On September 21, 2011, she informed her counsel that she could attend the mandatory settlement conference and the trial between December 9, 2011, and December 31, 2011.

The ex parte application was denied.

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[1] According to the Regevs, they changed counsel sometime in August 2011.

The notice of Guttman's deposition; Guttman's failure to appear

On September 23, 2011, the Regevs served notice of Guttman's deposition to take place on September 30, 2011. Three days before the deposition, Guttman's counsel informed the Regevs' counsel that Guttman would not be present for her deposition, nor would she be present for the mandatory settlement conference scheduled for October 4, 2011.

Guttman was not deposed.[2]

The Regevs' successful pursuit of a terminating sanction

The Regevs filed an ex parte application for a terminating sanction due to Guttman's failure to appear for her deposition. Alternatively, they filed a companion motion to be heard on shortened notice.

On October 11, 2011, the trial court denied the application and motion on the theory that *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc.* (2008) 165 Cal.App.4th 1568 (*Pelton-Shepherd*) did not permit the trial court to issue a discovery sanction until discovery had been reopened.

Two days later, the Regevs filed an ex parte application for the trial court to reopen discovery and issue a terminating sanction.[3] As a backup, they attached a companion motion to be heard on shortened notice. On October 17, 2011, the trial court reopened discovery and ordered Guttman's complaint stricken as a sanction for not submitting to a deposition.

This timely appeal followed.

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[2] The record indicates that Guttman did not appear for the mandatory settlement conference and was sanctioned $1,000. There is no evidence that she paid it.

[3] The papers also requested relief under Code of Civil Procedure section 473 based on excusable neglect in failing to seek a terminating sanction sooner.

All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

DISCUSSION

Guttman argues the trial court lacked jurisdiction to grant the Regevs' ex parte application and motion for a terminating sanction because the motion was made after the cutoff date provided by section 2024.020, and because the Regevs' papers were either motions for reconsideration or renewed motions that did not comply with section 1008. Alternatively, she argues that the trial court abused its discretion when it reopened discovery because it did not properly consider the factors in section 2024.050, subdivision (b). Next, Guttman argues that she should not have been sanctioned because she did not violate a discovery order, and because she was not provided with proper notice of the October 17, 2011, hearing. Last, Guttman argues that the trial court abused its discretion when it issued the terminating sanction. We consider Guttman's arguments below.

I. Section 2024.020.

Pursuant to section 2024.020, subdivision (a), a party has the "right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action." On the motion of any party, a trial court may "reopen discovery after a new trial date has been set." (§ 2024.050, subd. (a).)

According to Guttman, the trial court lacked jurisdiction to issue a terminating sanction because the Regevs' October 17, 2011, ex parte application and motion were filed long after the motion cutoff on April 12, 2011.[4] We examine this issue de novo. (*Burke v. California Coastal Com.* (2008) 168 Cal.App.4th 1098, 1106 [whether the trial court acted in excess of the jurisdiction granted to it by statute is a legal issue subject to de novo review].) Under our independent scrutiny, the Regevs' argument makes no headway. *Pelton-Shepherd* permits a trial court to consider a discovery motion after the motion cutoff as long as it properly evaluates the factors under section 2024.050 and

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[4] There is no indication in the record on appeal that the trial court ever extended any cutoff dates or reopened discovery prior to the October 17, 2011, hearing. April 12, 2011, is 15 days before the original trial date.

determines that discovery should be reopened. (*Pelton-Shepherd, supra,* 165 Cal.App.4th at pp. 1586–1589.) Thus, even though "a party does not have a *right* to have a discovery motion heard after the discovery motion cutoff date[, that] does not mean the court has no *power* to hear it, or that the court errs in hearing it." (*Pelton-Shepherd, supra,* at p. 1586.)

Because the trial court reopened discovery, it had the power to issue the terminating sanction.

II. Section 1008.

"When an application for an order has been made to a judge, or to a court, and refused in whole or in part, . . . any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order." (§ 1008, subd. (a).) "A party who originally made an application for an order which was refused in whole or part . . . , may make a subsequent application for the same order upon new or different facts, circumstances, or law[.]" (§ 1008, subd. (b).) If a party files a motion to reconsider or a renewed motion, section 1008, subdivisions (a) and (b) require the moving party to file a supporting declaration in which the new or different facts, circumstances, or law are identified. Section 1008 "specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." (§ 1008, subd. (e).)

Guttman contends that the Regevs' October 17, 2011, application and motion to reopen discovery and issue a terminating sanction duplicated the application and motion that were previously denied on October 11, 2011, and that the second round of papers violated section 1008 because they failed to identify the new or different facts, law or

circumstances relied upon. Because the relevant facts are undisputed, our review is de novo. (*Estate of Wilson* (2012) 211 Cal.App.4th 1284, 1290 [the applicability of a statutory standard to undisputed facts and questions of statutory interpretation are a question of law that are reviewed de novo].)

Significantly, the Regevs' second round of papers contained a request to reopen discovery under section 2024.050 and cited supporting facts. The attached declaration echoed that information. We therefore conclude that the Regevs presented new facts and circumstances. In other words, the second round of papers contained something the first did not: a procedural and factual basis to reopen discovery so that the trial court could issue a terminating sanction.

III. Section 2024.050.

A trial court's ruling on a motion to reopen discovery is reviewed for an abuse of discretion. (*Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 531.) "'"'"The term [judicial discretion] implies the absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. [Par.] To exercise the power of judicial discretion all the material facts in evidence must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision.' [Fn. omitted.]" [Citations.] "The appropriate [appellate] test for abuse of discretion is whether the trial court exceeded the bounds of reason." [Citations.]'" (*Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246.)

In exercising its discretion to reopen discovery, a trial court should consider any relevant matter, including but not limited to (1) "[t]he necessity and the reasons for the discovery;" (2) "[t]he diligence or lack of diligence of the party seeking the discovery or the hearing of a discovery motion, and the reasons that the discovery was not completed or that the discovery motion was not heard earlier;" (3) the "likelihood that . . . hearing the discovery motion will prevent the case from going to trial on the date set, or otherwise interfere with the trial calendar, or result in prejudice to any other party;" and

(4) "[t]he length of time that has elapsed between any date previously set, and the date presently set, for" trial. (§ 2024.050, subd. (b).)

In Guttman's view, the trial court abused its discretion when it reopened discovery under section 2024.050, subdivision (a) because it did not properly consider the factors set forth in subdivision (b).[5]

Regarding the necessity and reasons for deposing Guttman, the Regevs stated in writing that they had been "deprived . . . of the opportunity to examine [Guttman] as to her liability and damages contentions with the effect that [the Regevs] now have to attend trial unprepared." They also stated that the deposition was "vital" because she had indicated that she was not going to appear at trial.[6] At the hearing, the Regevs' counsel was asked why Guttman's deposition was important to the Regevs' case. He replied, "We feel she has admissions to make under the spontaneity of the deposition that would verify the hundreds of thousands of dollars of loans and financial support that my client provided to her and her family, not only before the divorce was filed but after the divorce was filed in order to maintain a variety of community expenses such as mortgages, interest, taxes, child support, things like that." Counsel added: "I don't have a witness here to testify at trial. I don't have a deposition that I could have taken to use here at trial with the spontaneity and the immediacy of the deposition and to be able to use that to impeach [Guttman] if she were here if I needed to. And she's not even showing up for

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[5] The parties and the trial court all assumed that section 2024.050 and *Pelton-Shepherd* required the reopening of discovery before the trial court could issue a terminating sanction. For purposes of this appeal, we assume the same. It bears pointing out, however, that we are aware of no authority stating that a motion for a terminating sanction is a discovery motion for purposes of section 2024.050 just because it relates to the misuse of the discovery process. While *Pelton-Shepherd* held that discovery had to be reopened for the trial court to consider a motion to compel responses to inspection demands, it did not discuss whether that same rule applied before the trial court considered a subsequent motion for a terminating sanction. (*Pelton-Shepherd*, *supra*, 165 Cal.App.4th at pp. 1584–1590.)

[6] This assumption was presumably made based on Guttman's ex parte application to continue the trial date.

trial to give me an opportunity to do that. [¶] . . . [¶] There's other witnesses coming in here. I don't know what she talked about with these witnesses. I don't know that I can elicit inconsistent statements from her. I'll never know that without a deposition." According to counsel, taking an opponent's deposition is a fundamental right.

When ruling on the necessity issue, the trial court stated: "Just so the record is clear, I'm convinced . . . that the discovery is necessary for the reasons specified by the moving party, that [Guttman's] deposition is useful and necessary for the defense in this case. [¶] That necessity is accentuated by the fact that she, apparently, is intent on not showing up for the trial at all; so that without, at least, a chance to depose the plaintiff in this matter, there will be no opportunity whatsoever to find out anything she knows, to cross-examine her in any meaningful respect . . . . [¶] I think it's not unreasonable to expect her to, at some point, submit to the jurisdiction of this Court for discovery in the manner proposed."

On this record, we are not prepared to conclude that the trial court's finding of necessity was an arbitrary determination.

To be fair to Guttman, the Regevs' counsel failed to articulate an issue specific to the need for reopening discovery. The alleged loans and financial support that Ron gave to Guttman before and after the "divorce was filed" do not have relevance at first blush. Presumably, they were obligations imposed on Ron during the dissolution and therefore preceded the dissolution and subsequent judgment for $265,635.91, but this is speculation. The Regevs never explained why Ron's alleged loans and financial support would undermine the fraudulent conveyance claim. As far as we know, there is no dispute that Guttman is a judgment creditor of Ron and that the judgment has never been satisfied. If that is true, it is unclear how the Regevs are prejudiced by not having an opportunity to depose Guttman on these matters.

Moreover, this case is markedly different from, for example, a personal injury or business tort case in which the plaintiff's deposition will be a preview of trial testimony on liability and damages. Grossly stated, Guttman simply has to prove that she has an unsatisfied judgment against Ron and that the transfer of the Keswick and Lenark

properties to the trust should be set aside. It is unclear that Guttman's deposition would shine any new light on those issues.

All that said, certainly the Regevs' counsel has a professional obligation to his clients to determine what Guttman knows regarding the transfers of the Keswick and Lenark properties from Ron to the trust. Information she has learned from any source about Ron's solvency and the consideration he received would be important for the Regevs' counsel to know when he is preparing for trial. Also, it would be important for the Regevs' counsel to know what anticipated trial witnesses may have said to Guttman. If Ron did give Guttman financial support and loans, perhaps that would suggest that he did not make the transfers with the intent to hinder, delay or defraud Guttman within the meaning of the Uniform Fraudulent Transfer Act. (Civ. Code, §§ 3439, 3439.04, subd. (a)(1).) Any statements made by or about the Regevs may be pertinent to whether they can defend against Guttman's claims on the theory that they acted in good faith and paid reasonably equivalent value for the transfers. (Civ. Code, § 3439.08, subd. (a).) In her briefs, Guttman contends that she possesses no discoverable information. That may or may not be true. The point is, the Regevs' counsel should not be deprived of the opportunity to find out for himself.

In her briefs, Guttman makes plain that she does not believe that discovery should be reopened simply because an opposing party wants to depose a plaintiff to determine if she possesses evidence. Guttman cites no authority for this proposition, and we easily reject it. She is not some tangential witness, so we cannot presuppose the relevance of her testimony. Thus, it was within the bounds of reason for the trial court to essentially conclude that Guttman's deposition was necessary because it might lead to the discovery of admissible evidence.

Next, Guttman contends that the trial court did not adequately address whether the Regevs were diligent. The record reveals otherwise. The trial court concluded that Guttman was equitably estopped from claiming that the Regevs had not been diligent because she "strung" them along from June 2011 until September 2011, and then said she

was not going to appear for trial.[7] Guttman fails to explain why we should second guess this finding. In any event, the salient point is that the trial court made a specific finding on the diligence issue.

In Guttman's view, the Regevs lacked diligence because the case was filed on December 23, 2009, and they waited until January 2011 to notice her deposition for February 10, 2011. She then complains that there was no reason for the Regevs to wait to file their request for a terminating sanction until days before the continued trial date on October 11, 2011. Given the equitable estoppel finding, Guttman's argument is moot. Regardless, her version of events contains glaring omissions and avoids the nuances of the case. The notice of Guttman's February 10, 2011, deposition was well in advance of the April 27, 2011, trial date. At Guttman's insistence, the trial was continued to July 18, 2011. The Regevs sought and obtained an order compelling Guttman to be deposed prior to July 6, 2011, on a date to be arranged by counsel. She was not deposed. Based on the record, it is easy to surmise that she did not agree to a date before July 6, 2011, because she did not plan on being in the United States at that time. Eventually, the case was continued to October 11, 2011, and Guttman agreed to be deposed on September 30, 2011. When Guttman failed to secure another continuance of the trial, and when she failed to appear for her deposition, the Regevs sought a terminating sanction. It appears that the Regevs pursued Guttman's deposition while trying to accommodate her schedule. In the context of this case, we believe that the Regevs acted with diligence.

Turning to the third factor, Guttman maintains that the trial court erred because it "incorrectly focused on the fact [Guttman] could not attend a deposition [on] September 30, 2011, though it was established she could visit Los Angeles later." We reviewed the reporter's transcript. What the trial court said was this: "I don't think hearing this motion is going to interfere with the trial date." The trial court was correct. The terminating sanction ended the case, meaning that there was no longer a trial date that could be delayed.

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[7] The trial court presumably meant to say that Guttman strung the Regevs along regarding her deposition.

According to Guttman, the trial court never considered the fourth factor, i.e., the length of time that elapsed between the previous trial date and the current trial date. This contention is belied by the record. At the hearing, the trial court stated: "And the fourth factor is not relevant in this case in the [trial court's] opinion." Thus, the trial court considered the factor and determined that it had no bearing on the analysis. In that respect, the trial court cannot be faulted. This is not a case in which a party was belatedly seeking discovery. Rather, the Regevs were pursuing a terminating sanction because they could not obtain Guttman's deposition despite trying to depose her for about nine unfruitful months. She only agreed to one date—September 30, 2011—and then she reneged on her agreement.

Last, Guttman posits that the trial court should have continued the trial for 60 days to a time when she could travel to Los Angeles to be deposed and attend trial. This argument does not go to whether discovery should be reopened. It goes to whether the trial court should have issued a terminating sanction, which we discuss in part VI of the Discussion, *post*. Moreover, we note that the trial court had already denied Guttman's request to continue the trial a third time. And given Guttman's repeated requests for continuances of the trial date due to her travel constraints, the trial court had no reason to believe another continuance would solve the issue. Further, Guttman's absenteeism was holding the Regevs hostage in a lawsuit. The trial court had no good reason to make the Regevs expend any more time or expense.

IV. The Existence of an Order Compelling Guttman's Deposition.

Guttman contends that she did not violate an order compelling her deposition because the trial court never issued one. As a result, she contends that there was no basis for the terminating sanction.

We cannot concur.

The minute order for June 14, 2011, states that the trial court heard an application to compel Isaac's deposition and a motion to compel Guttman's depositions, and that the trial court ordered the parties to pick deposition dates before July 6, 2011. The minute order does not state whether the trial court granted the application and motion, but that is

the inference. The problem for Guttman is that she did not provide the reporter's transcript of the June 14, 2011, hearing. Consequently, we do not know what the trial court and parties said and understood, and the record is inadequate for review. (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) This is because "[t]he same rules apply in ascertaining the meaning of a court order or judgment as in ascertaining the meaning of any other writing. [Citation.]" (*Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1205.) To the degree there is an ambiguity in the order, we cannot consider the full circumstances surrounding it.

Suffice it to say, either the order is ambiguous and we cannot resolve the ambiguity on this record, or it compels Guttman's deposition. Either way, Guttman's appeal does not benefit. The facts suggesting that the order compels Guttman's deposition include these: the order came after a hearing on the Regevs' motion to compel; the trial court ordered the parties to select deposition dates for Isaac and Guttman; at the October 17, 2011, hearing, the trial court stated that in June 2011 it "ordered the deposition of both [Guttman] and [Isaac][.]"

Guttman tells us that on June 14, 2011, "the only issue before the [trial court] *was the sequence* of depositions to be taken. [The Regevs] wanted to preserve their right to take [Guttman's] deposition based on the earlier notice[.]" A review of the motion reveals that the Regevs asked for an order compelling Guttman's deposition and sought monetary sanctions. Guttman's claim therefore strains credulity. Certainly it is possible that the landscape of the issues changed at the hearing, but we have no record of it to do a fact check.

Her parting argument is that the trial court lacked the authority to issue the June 14, 2011, order because it was not served in compliance with sections 1005 and 1013. But, once again, we do not have the reporter's transcript of the hearing to determine whether Guttman objected and how the issue was resolved. We suspect that there was no objection. In their motion, the Regevs stated that on June 6, 2011, counsel for the parties appeared before Judge Lapin on Guttman's ex parte application to compel the Regevs' deposition. Judge Lapin made the following orders: 1. Both sides were

entitled to bring a motion to compel the respective depositions. 2. In the interest of judicial economy, all arguments for compelling depositions would be heard on June 14, 2011, before the assigned judge, Judge Johnson.[8] We cannot verify counsel's statements. Instead, we point them out to suggest that it appears that Guttman has not fully explained the context of the June 14, 2011, hearing.

V. Notice.

In Guttman's view, she was not given proper notice of the Regevs' ex parte application and companion motion seeking a terminating sanction. We need not reach this issue. When a party files a written opposition to a motion and attends a hearing without objecting to defective notice, any objection is waived. (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 7.) Below, Guttman did not object to notice. Instead, her counsel filed a written opposition and attended the October 17, 2011, hearing. Both in writing and orally, he argued the merits.

VI. The Propriety of the Terminating Sanction.

"Failing to . . . submit to an authorized method of discovery" is a misuse of the discovery process. (§ 2023.010, subd. (d).) For a misuse of the discovery process, a trial court may impose the following sanctions: (a) monetary sanctions; (b) issue sanctions; (c) evidence sanctions; and (d) a terminating sanction. (§ 2023.030.) When a terminating sanction is imposed, the question for the reviewing court "'is not whether the trial court should have imposed a lesser sanction; rather, the question is whether the trial court abused its discretion by imposing the sanction it chose. [Citation.]'" (*Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1620; *Housing Authority v. Gomez* (1972) 26 Cal.App.3d 366, 371 (*Gomez*) ["Although the ultimate sanction of default is a drastic penalty which should be sparingly used, the unsuccessful imposition of a lesser sanction is not an absolute prerequisite to the utilization of the ultimate sanction; and the test on appeal is whether the lower court abused its discretion on the particular facts before it"].) Even if there was error, we will not reverse unless affirming would cause a

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[8] According to the motion, Judge Lapin was hearing ex parte matters for Judge Johnson while his courtroom was dark.

miscarriage of justice. "In the case of civil state law error, this standard is met when 'there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached.' [Citation.]" (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 939.)

Before issuing a sanction, a trial court "should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should '"attempt[] to tailor the sanction to the harm caused by the withheld discovery."' [Citation.] [It] cannot impose sanctions for misuse of the discovery process as a punishment. [Citations.]" (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992 (*Doppes*); *Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 304.) "'A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.' [Citation.]" (*Doppes*, *supra*, 174 Cal.App.4th at p. 992, fn. omitted.)

Guttman offers this argument for reversal. "[T]he drastic sanction of dismissal gave the [Regevs] far more than what they deserved. This is the problem; the [Regevs] failed to establish any prejudice or disadvantage they would suffer as a result of not taking [Guttman's] deposition. [Because they] fail[ed] to do so, the [trial court] was not equipped to fashion an appropriate sanction consistent with [Guttman's] alleged [misuse of discovery]. The [trial court], in its anger toward [Guttman], erroneously imposed the most drastic sanction when it was not warranted by the evidence. [¶] . . . [The Regevs] asserted [Guttman's] alleged long history of egregious conduct. Those arguments obviously impacted the [trial court's] objectivity, but alas, there was never any evidence introduced to support it. Instead, the [trial court] . . . made unfounded remarks that [Guttman] had abandoned her case. The true facts . . . were that [she] could not afford to travel to Los Angeles in September 2011, but was able to do so in December 2011. Clearly, it was improper for the [trial court] to impose the 'doomsday' sanction based on the circumstances." In summary, Guttman claims that the sanction was not tailored to the

harm, and that the trial court was angry and issued a terminating sanction as a punishment.

Lurking beneath Guttman's argument is the contention that her deposition is unnecessary. A defect immediately appears. She never parses the causes of action or allegations in her complaint, nor does she discuss the law applicable to her causes of action, to demonstrate that there is no possibility that the Regevs could obtain relevant information from deposing her. We take a brief, unaided look at the law to highlight the deficiency in Guttman's argument.

"A transfer made . . . by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor. [¶] (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: [¶] (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. [¶] (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." (Civ. Code, § 3439.04, subd. (a).) In determining intent to hinder, delay or defraud, a finder of fact can consider, inter alia, whether the debtor retained possession or control of the property transferred after the transfer; whether the transfer or obligation was disclosed or concealed; whether the debtor removed or concealed assets. (Civ. Code, § 3439.04, subd. (b).)

"A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." (Civ. Code, § 3439.05.)

A transfer is not voidable under Civil Code section 3439.04 against a person who took in good faith and for a reasonably equivalent value. (Civ. Code, § 3439.08.)

It is conceivable that Guttman possesses discoverable information regarding Ron's intent to hinder, delay or defraud her. He may have made statements to her during or after the dissolution proceeding that reveal or otherwise indirectly suggest his fraudulent intent. She certainly knows whether he disclosed the transfers to her, or whether he actively concealed them. She may be aware of information or statements suggesting that Ron has retained control of the properties despite the transfers. It is also possible that she is aware of other assets he has concealed. Simply put, it is impossible for us to conclude that Guttman's deposition is unnecessary. Though Guttman claimed that she could travel to the United States in December 2011 for her deposition, the trial court was not required to believe or oblige her. It had already denied her request to continue the trial a third time. The trial court had good reason. The record suggests that Guttman informed the trial court and Regevs that she would travel to Los Angeles in June 2011. That did not happen. She then claimed that she would travel to Los Angeles in September 2011. That also did not happen. As a result, we conclude that the trial court's terminating sanction was tailored to the harm, and that the terminating sanction was not issued as an impermissible punishment.

Gomez bolsters our conclusion. The defendant's deposition was noticed, and then it was rescheduled by the stipulation of his attorney. When the defendant failed to appear on the stipulated date, the plaintiff obtained a court order compelling the defendant's deposition. The defendant again failed to appear. The trial court entered an order striking the defendant's answer. That ruling was affirmed. The *Gomez* court stated: "The evidence in this case establishes both a [willful] failure to appear and be deposed pursuant to the stipulation of counsel and disobedience of a court order. Under the circumstances here present, the trial court could justifiably conclude that defendant had no intention of being deposed and would continue to engage in evasive tactics to achieve that end. The trial court clearly did not abuse its discretion in striking the answer and cross-complaint and entering defendant's default." (*Gomez*, *supra*, 26 Cal.App.3d at

pp. 372–373.) Similarly, Guttman violated a court order when she was not deposed by July 6, 2011, and then she reneged on her counsel's agreement that she would appear on September 30, 2011. She showed no intention that she would do anything other than keep evading her deposition.

In passing, Guttman charges the trial court with error because it failed to consider imposing something less than a terminating sanction. But she cited no supporting legal authority, so we need not take up her argument. (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862 ["'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived'"].) Furthermore, she did not explain what kind of lesser sanction would be appropriate. By implication, she suggests an issue or evidence sanction. She did not, however, explain what the substance of that sanction might be. This leads us to our closing thought. Even if there was an abuse of discretion, Guttman has not demonstrated prejudice because there is no showing that an appropriate issue or evidence sanction would not also end her case.

DISPOSITION

The judgment is affirmed.

The Regevs shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
FERNS

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.